Filed 6/29/12 Exigen Properties v. Genesys Telecommunications Laboratories CA1/3

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THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

EXIGEN PROPERTIES, INC., et al., Plaintiff s and Respondents, v. GENESYS TELECOMMUNICATIONS LABORATORIES, INC., Defendant and Appellant.	A129609 (San Mateo County Super. Ct. No. CIV 481741)

Appellant Genesys Telecommunications Laboratories, Inc. (Genesys) appeals from an order denying its motion to compel arbitration. Genesys, which is the sole defendant in the action below, contends that trade secret theft and defamation claims alleged by plaintiffs fall within the scope of a broadly worded arbitration clause contained in a strategic partnership agreement signed by some of the plaintiffs. Genesys also contends that the nonsignatory plaintiffs—business entities related to or affiliated with the signatory plaintiffs—are equitably estopped from opposing arbitration. In denying the motion to compel arbitration, the trial court based its decision on the threshold question of the arbitrability of the claims and did not reach the issue of whether the nonsignatory plaintiffs should be compelled to arbitrate.

We conclude the trial court erred. Accordingly, we reverse and remand for further proceedings to consider whether equitable principles justify compelling the nonsignatory plaintiffs to arbitrate their dispute with Genesys.

FACTUAL AND PROCEDURAL BACKGROUND

The Parties and the Strategic Partnership Agreement (SPA)

Genesys is a telecommunications software company. Its software products help integrate customer service call centers and computer systems. After Genesys became a public company, it was sold in 2000 to Alcatel, now known as Alcatel-Lucent. Both before and after the founders of Genesys sold the company to Alcatel, they had formed or acquired several business entities for the purpose of developing and marketing products and services associated with call centers and "computer telephony integration." Among these entities were respondent Exigen Ltd., Connectivity, and DataMax Technologies, Inc., which are described as the predecessor entities to the plaintiffs in the action below. We shall refer to the plaintiffs below (respondents herein) collectively as "Exigen" or "Exigen plaintiffs" unless it is necessary to identify a particular plaintiff or set of plaintiffs with greater specificity.[1] The Exigen plaintiffs are described as "telecommunications software companies" that are "among the world's most successful companies in providing application hosting technology."

In December 2000, Genesys and Exigen, Ltd. entered into a contract referred to as the Strategic Partnership Agreement (SPA). As set forth in the SPA, it was the parties' intention to "establish a worldwide, strategic, multi-dimensional relationship," with each party expressing its desire to resell and distribute the products of the other party. The parties agreed that the SPA superseded all other agreements between the parties, including agreements between Genesys and predecessor entities that had become part of Exigen, Ltd.

The SPA established the framework for an ongoing business relationship. It effectively grants the parties non-exclusive, non-transferable licenses to distribute and

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[1] As set forth in the operative second amended complaint (Second Amended Complaint), the plaintiffs in the action below are: (1) Exigen Properties, Inc., (2) Exigen Services, Ltd., (3) Exigen Services (USA), Inc., (4) Exigen (USA), Inc., (5) Exigen Ltd., (6) Exigen (Canada), Inc., (7) Exigen Latvia (SWH Tehnologija), (8) Exigen Europe B.V., (9) Exigen Deutschland GmbH, (10) Exigen Services Europe Limited, (11) Exigen East B.V., (12) Exigen Services Pacific PTY Limited, (13) Exigen Services, LLC, and (14) Foreign Enterprise Exigen Services.

sublicense copies of each other's software, either as standalone products or bundled with other products. The SPA includes an exhibit listing the generally available software products of both Genesys and Exigen, Ltd. that are covered by the SPA. It also includes an exhibit containing standard form license agreements for both Genesys and Exigen, Ltd. that are to be used when one party licenses the other party's product to an end user. Pursuant to the SPA, each party agreed to provide sales and technical training to the other party's sales and marketing organizations in order "to identify mutually beneficial opportunities." The SPA includes exhibits setting forth the standard terms for providing sales and technical training to the other party. The parties further agreed to "use commercially reasonable efforts to market, distribute and support" each other's products, to promote the products "in a manner that is consistent with good business ethics," and to "conduct its business in a manner that will reflect favorably on the good will and reputation of the Parties."

The SPA includes a confidentiality provision requiring each party to maintain in confidence all information, such as "computer programs, code, [and] algorithms," that is marked or otherwise designated as confidential by the other party. The confidentiality provisions also prohibit the parties from reverse-engineering, dissembling, or decompiling any "prototypes, software or other tangible objects" containing confidential information.

In section 16 of the SPA, the parties agreed to submit disputes to arbitration. The arbitration provision provides, in relevant part: "All disputes or controversy arising out of or in connection with or related to this Agreement or the breach or alleged breach thereof including any question regarding its existence, validity or termination shall attempt to be settled by an amicable and good faith effort by the Parties' respective executives. . . . In the event the Parties are unable to resolve any dispute or controversy, that such dispute shall [be] settled by final and binding arbitration, and not by any other means. Such arbitration process shall be in accordance with the commercial rules of the American Arbitration Association (the 'AAA') then in effect."

The initial term of the SPA was three years. The SPA was to continue in effect for additional, consecutive one-year terms unless a party notified the other party of its intent to terminate the SPA at least 90 days before the expiration of a term. Thus, the SPA would continue in effect unless a party expressly chose to terminate it or unless other, specified conditions were met.

The parties amended the SPA four times. In the first amendment, dated August 17, 2002, the parties agreed to certain revised pricing terms. As reflected in the preamble, the parties to the first amendment were Exigen (USA), Inc. and "affiliates." The terms of the first amendment clarified that the name "Exigen, Ltd." in the SPA would be replaced by "Exigen (USA), Inc. and its subsidiaries and Exigen Properties, Inc." The three subsequent amendments involved these same Exigen entities. A second amendment to the SPA was entered into effective May 19, 2005. Among other things, the second amendment provided that Genesys agreed "to sell, market, support, and pay sales compensation for, the Exigen Universal Workflow Product as it does with its own core offerings." The second amendment also reflected that the parties were "in the process of negotiating a new master strategic partnership agreement," and it specified that the products licensed pursuant to the second amendment would be governed by the terms of any new master agreement, if entered into within 180 days of the effective date of the second amendment. There is no indication in the record before this court that the parties entered into a new master agreement, as had been contemplated at the time of the second amendment. Instead, the SPA was amended two more times, with the fourth amendment effective as of November 1, 2006.

The Deutsche Telekom Deal

Genesys's largest customer is Deutsche Telekom (DT). Its first transaction with DT occurred in 2004 and was Genesys's largest implementation of Exigen's product. The deal involved T-Mobile, which is an Exigen customer for work unrelated to Genesys.

In 2007, DT sought to restructure its customer services processes and software. Between June and December 2007, Genesys worked on securing the restructured DT deal. In December 2007, Genesys sent engineers to Exigen Services (USA), Inc.'s San Francisco office to better understand how Exigen's trade secrets functioned, with Genesys representing that its engineers were obtaining the information so it could present DT and other customers with a "more intelligent solution to potential new applications required by DT." Also in December 2007, after Genesys and DT had reached agreement regarding the structure of the deal, the CEO of Genesys contacted Exigen seeking approval of a substantial, fifteen percent pricing discount for some of the Exigen products that were part of the proposed new deal. Exigen declined to discount its application hosting technology.[2]

After unsuccessfully seeking a discount from Exigen, Genesys proceeded to pursue the DT deal and purported to develop and acquire its own application hosting technology in lieu of using Exigen's product in the restructured deal. According to Exigen, at around the time Genesys engineers visited Exigen in December 2007, Genesys allegedly developed products that were competitive with Exigen's products, purportedly using Exigen's trade secrets. Exigen alleges that the purpose of this purported trade secret theft was for Genesys to compete directly with Exigen's product, specifically for use at DT and other customers worldwide.

In March 2008, representatives of Exigen allegedly first learned that Genesys was attempting to compete with Exigen, not just in its dealings with DT, but also by purportedly engaging in a worldwide campaign to disparage Exigen's products and create the false impression that its application hosting technology could not perform in large platform environments. According to Exigen, it learned in a conference call with representatives of T-Mobile that Genesys had allegedly made disparaging remarks about the capabilities of Exigen's Universal Workflow Solution and Universal Process Link products. In addition, Genesys allegedly told T-Mobile that its "Business Router" solution was superior to Exigen's proposed solution. Exigen contends these claims are false.

In a letter dated August 28, 2008, counsel for Exigen, Ltd. wrote to the president and CEO of Genesys requesting a "meeting with the appropriate executive of Genesys to resolve the controversy regarding Genesys' conduct in connection with Deutsche

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[2] There is some inconsistency in the allegations of the Second Amended Complaint regarding Exigen's response to the request for a discount. At one point, Exigen alleges it "declined" to discount its application hosting technology. Elsewhere, it alleges it did not respond one way or the other to the discount request.

Telekom." The attorney stated that "Exigen is a party to a Strategic Partnership Agreement with Genesys," and that "Exigen has been in communication with you regarding breaches of the [SPA] in connection with Genesys' relationship with Deutsche Telekom." The attorney further referred to the dispute resolution clause of the SPA, in which the parties agreed their respective executives would attempt to make an amicable and good faith effort to settle disputes covered by the clause.

Procedural History

In its original complaint against Genesys (hereafter, Original Complaint), Exigen[3] asserted causes of action for unfair competition (Bus. & Prof. Code, § 17200), trade libel, defamation, aiding and abetting misappropriation of trade secrets, and unjust enrichment. Exigen premised the causes of action for unfair competition, trade libel, and defamation upon allegations that Genesys had made false or misleading statements about Exigen products. More specifically, Exigen alleged that Genesys falsely stated that "[Exigen's] Universal Workflow Solution will not scale to 20,000 seats," "no one knows now [Exigen's] next product, Universal Process Link, will scale," and "the Genesys 'Business Router' solution is superior to [Exigen's] proposed solution." The causes of action for unjust enrichment and aiding and abetting misappropriation of trade secrets were based upon allegations that Genesys had misappropriated and used Exigen's trade secrets and other confidential and proprietary information maintained on Exigen's servers in San Francisco. In describing the purported misappropriation of trade secrets, the Original Complaint specifically referred to the alleged incident in which Genesys engineers had visited Exigen offices in December 2007 for the ostensible purpose of providing DT and other customers with a more intelligent solution.

The Original Complaint devoted an entire section to the partnership among the parties, including an extensive discussion of the SPA. Exigen emphasized that, "[p]ursuant to the SPA, Genesys and Plaintiffs desired (a) 'to establish a worldwide,

[3] The Original Complaint included 12 Exigen plaintiffs, including all of the entities listed in footnote 1, *ante*, except for Exigen Services, LLC, and Foreign Enterprise Exigen Services, which were added later as plaintiffs.

strategic, multi-dimensional relationship'; (b) 'to resell and distribute the products of the other Party'; and (c) 'that the business terms in the [SPA] be reciprocal in nature to the extent practical and commercially reasonable.' " Exigen further alleged that Genesys had represented to some of the Exigen plaintiffs that it would market, distribute, and promote Exigen's products and services in an ethical "manner that would reflect favorably on the good will and reputation of the parties to the SPA." As alleged in the Original Complaint, "the parties to the SPA expected Genesys to act fairly, truthfully, and to advertise in a manner that was not falsely disparaging to the parties to the SPA."

Genesys promptly moved to compel arbitration, arguing that all of Exigen's claims have their roots in the SPA. In its opposition, Exigen asserted that the parties intended the arbitration clause in the SPA to apply only to contractual claims. It also contended the Exigen plaintiffs who did not sign the SPA could not be required to arbitrate absent a showing of an alter ego relationship with a SPA signatory.

At the hearing on the motion, the trial court began by stating it had requested an appearance by the parties to address how the interests of the Exigen plaintiffs who signed the SPA differed from the interests of the nonsignatory plaintiffs. The court clearly expressed that the SPA's arbitration clause was "all encompassing" and that it had "no problem ordering the signatories and [their] subsidiaries to arbitration under [the SPA]." However, the court stated it had "some difficulty" with regard to the nonsignatories and said it "might be inclined to allow limited discovery by the defendant to ascertain the extent of the differences in the claims of the non-signator[ies] before I rule on this motion." Counsel for Exigen suggested that the parties could conduct "limited discovery on the trade secrets, what trade secrets were taken from what entity at any point in time and we could come back, your Honor, in a brief period of time." Following further argument, the court denied the motion without prejudice and allowed "limited discovery into the issues of the differences in the claims between the respective Exigen entities and properties issues and any other differences and alterego [*sic*]. . . ." The parties agreed to waive preparation of a written order.

During the limited discovery phase, Exigen filed a first amended complaint (First Amended Complaint), which added two additional Exigen entities as plaintiffs.[4] Whereas the Original Complaint referred extensively to the SPA in its discussion of the partnership among the parties, the First Amended Complaint contains two paragraphs describing the SPA. Instead of describing the SPA as a worldwide strategic, multi-dimensional partnership, the First Amended Complaint characterizes it as "an agreement that governs specific licensing arrangements between the signatories." The First Amended Complaint also omits any allegation that the parties to the SPA expected Genesys to act fairly and to refrain from advertising in a manner that was falsely disparaging to Exigen. Exigen further expressly alleges the SPA is irrelevant, as follows: "The causes of action alleged herein do not arise out of the SPA, are not in connection with the SPA, and are not related to the SPA." Exigen later filed a largely identical Second Amended Complaint after the trial court sustained a demurrer to the First Amended Complaint with leave to amend. The Second Amended Complaint adds a separate cause of action for trade secret misappropriation but is otherwise based upon the same allegations as the Original Complaint and the First Amended Complaint. Like the First Amended Complaint, the Second Amended Complaint contains the allegation that the SPA is irrelevant to the parties' dispute.

Following the limited discovery phase, Genesys renewed its motion to compel arbitration. Genesys stated that the court had already ruled the two signatory Exigen plaintiffs were bound by the SPA to arbitrate their claims, and it characterized the sole issue before the court as whether the nonsignatory Exigen plaintiffs were likewise compelled to arbitrate. The legal argument in Genesys's motion papers was limited to whether the nonsignatory Exigen plaintiffs may be equitably compelled to arbitrate their claims. In its opposition to the motion, Exigen devoted a brief section to its argument that the claims contained in the Second Amended Complaint do not fall within the scope of the SPA's arbitration clause. Exigen premised its argument on a newly submitted declaration,

[4] See footnote 3, *ante*.

and it stated in a footnote that the trial court had "never held that all the claims asserted in this action are within the scope of the arbitration clause or that the two signatory plaintiffs are bound by the SPA to arbitrate their claims." The vast majority of Exigen's opposition focuses on whether the nonsignatory plaintiffs can be compelled to arbitrate.

The judge who heard the renewed motion to compel arbitration was different from the judge who heard the initial motion. The court denied the renewed motion. As a threshold matter, the court expressed its view that the trial judge who had heard the initial motion "did not make any dispositive finding on the issue of whether or not the Arbitration clause is limited to disputes concerning or arising out of the breach of specified licensing agreements." The court considered the prior judge's comments during the course of the earlier hearing regarding the arbitrability of claims asserted by Exigen plaintiffs who were signatories to the SPA as "merely dicta." The court characterized the SPA as "primarily a licensing agreement" with a limited scope. According to the court, because the SPA did not regulate competition among the litigants, and because the Exigen plaintiffs' causes of action are based on allegedly unfair competitive tactics, the claims do not arise under the SPA. The court was guided by federal decisions that purportedly turn on whether the agreement containing the arbitration clause is the "instrumentality of the alleged wrongful competition." The court concluded the "actions giving rise to [Exigen's] causes of action occurred independently from the SPA, and it is not necessary to interpret the SPA in order to adjudicate [Exigen's] claims." Thus, the court based its decision on the threshold issue of the arbitrability of the claims under the SPA. It did not reach the question of whether the Exigen plaintiffs that did not sign the SPA could be compelled to arbitrate.[5]

Genesys timely appealed from the order denying its motion to compel arbitration.

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[5] In its tentative decision, the court expressed the view that Genesys had not met its burden to establish an equitable estoppel or alter ego basis for compelling nonsignatories to arbitrate their claims. This issue is not addressed in the written order denying the motion.

DISCUSSION

The question of whether the dispute between the parties should be submitted to arbitration, in whole or in part, requires a multiple-step analysis. First, it is necessary to assess whether the parties to the SPA agreed to arbitrate the claims described in the Second Amended Complaint. If not, the inquiry is at an end. Otherwise, the second issue to consider is whether equitable principles support an order compelling the nonsignatory Exigen plaintiffs to arbitrate their claims. Depending upon the resolution of this second issue, the court has a number of options, including ordering some, all, or none of the parties to arbitrate their dispute. (See Code Civ. Proc., § 1281.2, subd. (c).)

Because the trial court denied the motion on the ground the claims are not governed by the SPA's arbitration clause—even as to signatories to the SPA—we focus our analysis on this threshold issue.

1. *Authority of One Trial Judge to Overrule Another*

As a preliminary matter, we address Genesys's argument that the trial judge who ultimately denied the motion was bound to follow the "ruling" by the original trial judge that the signatory Exigen plaintiffs were required to arbitrate under the SPA. Genesys relies on the principle that one trial judge lacks the power to vacate an order duly made by another trial judge except in limited circumstances and in the manner prescribed by statute. (See *Church of Scientology v. Armstrong* (1991) 232 Cal.App.3d 1060, 1069.)

Genesys's argument has some appeal. After all, the original trial judge clearly stated that Exigen's claims were arbitrable under the SPA, at least as to the signatories to that agreement. The judge denied the motion without prejudice but limited the scope of discovery to issues relating to the nonsignatories, plainly signaling that the only issues that remained to be determined related to the nonsignatories. Following what Genesys claims was 10 months of discovery, Genesys renewed its motion and focused exclusively on whether the nonsignatories could be compelled to arbitrate. The trial judge who ultimately denied the motion effectively reconsidered the original trial judge's ruling on the threshold issue of arbitrability, reversed that ruling, and rendered the issues relating to nonsignatories moot. In other words, the trial court's ultimate decision rendered the entire process of pursuing discovery and further briefing relating to nonsignatories entirely unnecessary.

We need not resolve the question of whether the trial judge who considered the renewed motion was required to follow the original trial judge's stated position concerning the threshold issue of arbitrability. As a practical matter, we review the propriety of the trial court's ultimate order denying the motion to compel arbitration, regardless of whether the court chose to follow or reject the view espoused by the original trial judge. Accordingly, we proceed to consider the merits of Genesys's challenge to the appealed order.

2. *Arbitrability of Claims Alleged in the Second Amended Complaint*

Whether there is an agreement to arbitrate the claims alleged in the Second Amended Complaint "turns on the language of the arbitration clause" contained in the SPA. (*EFund Capital Partners v. Pless* (2007) 150 Cal.App.4th 1311, 1320 (*EFund*).) Where, as here, there is no dispute regarding the language of the arbitration clause and no conflicting relevant evidence as to its terms, our review is de novo. (*Ibid.*; *Metalclad Corp. v. Ventana Environmental Organizational Partnership* (2003) 109 Cal.App.4th 1705, 1716; *Titolo v. Cano* (2007) 157 Cal.App.4th 310, 316 (*Titolo*).)

"To determine whether a contractual arbitration clause requires arbitration of a particular controversy, the controversy is first identified and the issue is whether that controversy is within the scope of the contractual arbitration clause." (*In re Tobacco Cases I* (2004) 124 Cal.App.4th 1095, 1106.) The moving party bears the burden of establishing the existence of a valid arbitration agreement. (*Titolo, supra,* 157 Cal.App.4th at p. 316.) "Once the existence of a valid arbitration clause has been established, '[t]he burden is on "the party opposing arbitration to demonstrate that an arbitration clause *cannot* be interpreted to require arbitration of the dispute." ' [Citation.]" (*Ibid.*; accord *EFund, supra,* 150 Cal.App.4th at p. 1321.)

There is a strong public policy in favor of arbitration in California. (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9; *Titolo, supra,* 157 Cal.App.4th at p. 317.) As a result, "any doubt as to the meaning and interpretation of an arbitration agreement is resolved in favor of requiring arbitration. [Citations.]" (*Titolo, supra,* at p. 317.) However, "[t]here is no public policy requiring persons to arbitrate disputes they have not agreed to arbitrate. [Citations.]" (*EFund, supra,* 150 Cal.App.4th at p. 1320.)

In determining whether a contractual arbitration clause covers a particular dispute, the primary focus is on whether the clause at issue is "broad" or "narrow." (*Bono v. David* (2007) 147 Cal.App.4th 1055, 1067.) "A 'broad' clause includes those using language such as '*any claim* arising from or *related* to this agreement' . . . ." (*Ibid.*) In *EFund, supra,* the Court of Appeal described as "very broad" an arbitration clause providing as follows: " '*Any* dispute or other disagreement arising from or out of this [agreement] shall be submitted to arbitration . . . .' " (*EFund, supra,* 150 Cal.App.4th at p. 1322.) By contrast, in *Bono v. David,* the court characterized as "narrow" an arbitration clause limited in application to " 'the construction and application of any provision of this Agreement.' " (*Bono v. David, supra,* 147 Cal.App.4th at p. 1067.)

The Courts of Appeal have interpreted broadly worded arbitration clauses to encompass a wide array of claims, including tort causes of action. (*EFund, supra,* 150 Cal.App.4th at p. 1323; see also *Coast Plaza Doctors Hospital v. Blue Cross of California* (2000) 83 Cal.App.4th 677, 681, 685-686 [unfair trade practices, negligent interference with prospective economic advantage]; *Vianna v. Doctors' Management Co.* (1994) 27 Cal.App.4th 1186, 1189 [defamation]; *Merrick v. Writers Guild of America, West, Inc.* (1982) 130 Cal.App.3d 212, 219 [malicious prosecution].) "It has long been the rule in California that a broadly worded arbitration clause . . . may extend to tort claims that may arise under or from the contractual relationship." (*Coast Plaza Doctors Hospital,* 83 Cal.App.4th at p. 686.) Appellate courts have typically employed the formulation that a broad arbitration clause embraces tort as well as contract claims as long as the tort claims have "their roots in the contractual relationship between the parties." (*EFund, supra,* 150 Cal.App.4th at p. 1323.) Included among claims subject to arbitration under broad-form arbitration clauses are defamation claims (*Vianna v. Doctors' Management Co., supra,* 27 Cal.App.4th at p. 1190), trade secret theft claims (*Simula, Inc. v. Autoliv* (9th Cir. 1999) 175 F.3d 716, 718, 719), and unfair competition claims (Bus. & Prof. Code, § 17200), including claims for unjust enrichment (*Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303, 315-320).

As set forth in the SPA, the signatories agreed to arbitrate "[a]ll disputes or controversy *arising out of or in connection with or related to this Agreement* or the breach or alleged breach thereof . . . ." (Italics added.) The arbitration clause is indisputably a broad provision that is not limited to breaches of contract or contract-based causes of action.[6] The question remains whether the Exigen plaintiffs' trade secret misappropriation and defamation claims, which form the basis for the causes of action in the Second Amended Complaint, can be characterized as "arising out of," "in connection with," or "related to" the SPA.

Exigen's story is simple. The parties had a long-term strategic partnership pursuant to the SPA in which they agreed to market, sell, and distribute each other's products, as either standalone or bundled products. Because of the strategic partnership, Genesys offered to include Exigen's software in a deal with DT. Exigen refused to commit to the deal because of a price dispute. Around the same time, Genesys allegedly sent engineers to Exigen to learn about Exigen's software for the DT deal. There, Genesys allegedly stole Exigen's trade secrets so that Genesys could sell a product to DT that did not require Exigen's software. Finally, Genesys allegedly defamed Exigen's software in discussions with DT so that DT would buy Genesys's software instead of Exigen's.

The dispute is plainly rooted in the business relationship created by the SPA. The SPA created the framework for reselling and distributing each other's products and for bundling the products of the parties. The SPA provides that the parties would use commercially reasonable efforts to market, distribute, and support the products of the other party. The SPA provides for pricing discounts and requires the parties to seek prior approval for discounts exceeding the agreed-upon amount. The justification offered for

[6] Because the clear language of the SPA governs our determination, it is unnecessary to consider extrinsic evidence offered by Exigen concerning whether the parties to the SPA intended it to apply to business tort claims. (See *EFund, supra*, 150 Cal.App.4th at p. 1322.)

allowing Genesys engineers to visit Exigen was "to identify mutually beneficial opportunities," which was also the stated purpose for such endeavors as expressed in the SPA. The parties also agreed to maintain all trade secrets in confidence and not to reverse engineer or decompile any of the other party's software. Further, the SPA specifically applied to Exigen's Universal Workflow Solution, the product Genesys allegedly defamed by stating it would not work in large platform environments. Similarly, Genesys's Business Process Routing product (or "Business Router" solution), which Genesys supposedly touted as superior to Exigen's competing solution, is covered by the SPA.

In short, the defamation and trade libel claims concern products either expressly covered by the SPA or encompassed within the scope of the provision in the SPA in which the parties agreed to reasonably market, distribute, and support each other's generally available products. The alleged trade secret theft was facilitated through training offered to identify mutually beneficial opportunities, as contemplated by the SPA, and the purported theft violated the prohibition against reverse engineering the other party's products or misusing that party's confidential information.

We are mindful, too, that in its Original Complaint Exigen referred extensively to the SPA in describing its business partnership with Genesys. Although Exigen did not assert contract-based causes of action in its Original Complaint, it nonetheless referred to the duties, obligations, and relationship created by the SPA in setting the framework for its assertion of various business torts. Exigen later discounted the importance of the SPA in its First Amended Complaint and Second Amended Complaint, characterizing the SPA as a specific licensing agreement that is irrelevant to the parties' dispute. However, those later allegations are inconsistent with its description of the SPA in the Original Complaint. Exigen could not simply plead around its earlier admissions supporting arbitration by inexplicably recharacterizing the nature of the dispute. (Cf. *Vallejo Development Co. v. Beck Development Co.* (1994) 24 Cal.App.4th 929, 946 [court not bound to accept inconsistent allegations as true when plaintiff fails to explain inconsistencies with prior allegations].) Further, in the pre-litigation letter from Exigen, Ltd.'s counsel to Genesys, Exigen, Ltd.'s attorney characterized the dispute between the parties as one involving breaches of the SPA. While we do not suggest its lawyer's characterization is conclusive or binding upon Exigen for purposes of determining arbitrability, we nonetheless note that the characterization by Exigen's own attorney is consistent with a conclusion that its claims arise from, relate to, or are connected with the SPA.

The authorities relied upon by Exigen are inapposite. In *Medical Staff of Doctors Medical Center in Modesto v. Kamil* (2005) 132 Cal.App.4th 679, 682-683 (*Kamil*), which is cited by Exigen, the arbitration clause was narrow and applied only to "any problem or dispute *concerning the terms* of this Agreement," and if the dispute concerned a "Utilization Review," then arbitration was limited to disputes over whether benefits were medically necessary or payable. (Italics added.) Likewise, in *Bono v. David, supra,* 147 Cal.App.4th at p. 1057, another case relied upon by Exigen, the arbitration clause was a narrow one requiring arbitration of controversies "involving the *construction or application* of any provision of this Agreement." (Italics added.) In *Kamil,* the court colorfully stated that "[t]he defamation complained of here no more concerns the terms of the agreement, than would a punch in the nose during a dispute over medical billing." (*Kamil, supra,* at p. 684.) That conclusion necessarily turned on the narrow terms of the arbitration clause. In this case, the arbitration clause is not limited to disputes over the *terms* of the SPA or their proper construction.

In another case relied upon by Exigen, *RN Solution, Inc. v. Catholic Healthcare West* (2008) 165 Cal.App.4th 1511, 1523-1524, the court held that the arbitration clause contained in a nursing services contract did not encompass the plaintiff's sexual assault and battery claims against the defendant. The case simply stands for the proposition that "a broad arbitration clause in a business contract" does not cover "violent intentional torts." (*Id.* at p. 1524.) Notably, the court did not disturb the trial court's finding that certain *business torts* alleged by the plaintiff, including defamation, were subject to arbitration. (*Id.* at pp. 1516-1517, 1524 [conduct occurring within context of parties' business relationship, including defamation, is arbitrable].) Thus, *RN Solution* does not aid Exigen. For similar reasons, Exigen's reliance on cases involving intentional torts is misplaced. (See *Victoria v. Superior Court* (1985) 40 Cal.3d 734, 737, 747 [claim that hospital orderly raped patient not covered by arbitration clause concerning rendition or failure to render health services]; *Coors Brewing Co. v. Molson Breweries* (10th Cir. 1995) 51 F.3d 1511, 1516 [hypothetical physical assault claim not arbitrable under business agreement].)

Both the trial court and Exigen rely on a federal Seventh Circuit decision, *AlliedSignal, Inc. v. B.F. Goodrich Co.* (7th Cir. 1999) 183 F.3d 568 (*AlliedSignal*). The decision provides little guidance. In *AlliedSignal*, Coltec and AlliedSignal entered into a "Strategic Alliance Agreement" (SAA) that provided for cooperation between the parties in preparing joint bids for aircraft landing systems. The agreement contained an arbitration clause. Coltec planned to merge with one of AlliedSignal's principal competitors, B.F. Goodrich. AlliedSignal and others filed a Clayton Act antitrust action against the parties proposing the merger. AlliedSignal also claimed the proposed merger would violate the SAA. (*Id.* at pp. 570-571.) B.F. Goodrich argued the antitrust claims arose out of the SAA—and therefore were subject to arbitration—because AlliedSignal "would suffer antitrust injury only if B.F. Goodrich [and] Coltec fail[ed] to abide by the terms of the SAA." (*Id.* at p. 573.) The Seventh Circuit concluded the antitrust claim did not arise under the SAA. The entirety of the court's analysis of the claim's arbitrability is set forth as follows: "AlliedSignal claims antitrust injury in part from an increase in the price of landing gear it purchases as a landing systems integrator. The SAA, though it does provide for shared information and cooperation, does not regulate the price Coltec may charge for its landing gear. Therefore, B.F. Goodrich-Coltec could *fully comply* with the SAA and still cause AlliedSignal antitrust injury by charging uncompetitive prices." (*Id.* at p. 573, italics added.)

At first glance, the facts in *AlliedSignal* appear to bear a resemblance to the facts in this case. Like the SPA in this case, the SAA in *AlliedSignal* was characterized as a strategic agreement requiring cooperation among the parties in the marketing of their complementary products. Like the issue presented here, the issue in *AlliedSignal* was whether certain alleged anticompetitive conduct arose from or related to the parties' strategic partnership agreement. The similarities end there. First, the federal court's cursory analysis does not appear to be consistent with California law, which specifies that tort claims may be subject to arbitration if they have their roots in the contractual relationship between the parties. (See *EFund, supra*, 150 Cal.App.4th at p. 1323.) We are unaware of any case applying California law in which a court concluded a tort claim is not arbitrable if the tortfeasor could otherwise "fully comply" with the terms of the agreement in which the tort claim is alleged to have its roots. The test under California law is not so narrow.

Furthermore, even under the test adopted by the court in *AlliedSignal*, Exigen's claims fail. In *AlliedSignal*, the court concluded the agreement among the parties to cooperate in preparing joint bids did not regulate the prices the parties could charge. (*AlliedSignal, supra*, 183 F.3d at p. 573.) Consequently, monopolistic activity that might tend to increase one party's prices did not implicate the duties and obligations imposed by the agreement to cooperate in preparing joint bids. Here, by contrast, the alleged business torts—trade libel and trade secret misappropriation—go to the heart of the parties' agreement to cooperate in promoting each other's products and to share confidential information without misappropriating or otherwise misusing that information.

The trial court concluded the alleged anticompetitive activity occurred independently of the SPA and that it was unnecessary to interpret the SPA in order to adjudicate Exigen's claims. For reasons described above, the test for whether a tort claim is arbitrable under a broadly worded arbitration clause is not whether it is necessary to interpret or construe the terms of the agreement at issue. Moreover, we disagree with the conclusion that the alleged anticompetitive activity occurred independently of the SPA. What the trial court and Exigen seem to mean is that the alleged trade secret misappropriation and defamation would have occurred even if the SPA did not exist. However, the point is that the SPA *does* exist and creates a framework for the parties' relationship. The parties voluntarily agreed to arbitrate disputes arising out of that strategic partnership. Further, it was the relationship created by the SPA that gave rise to the opportunity to purportedly misappropriate Exigen's trade secrets and to allegedly defame Exigen's products after Exigen refused an opportunity to bundle its products with Genesys at a discounted rate.[7]

Exigen contends the scope and term of the SPA are limited, claiming that it was restricted to certain license agreements. We disagree. For reasons we have described above, the SPA was not simply a licensing agreement. The SPA established a framework for a worldwide partnership in which the parties sought to market each other's products and to find and exploit mutually beneficial opportunities. The SPA was not only amended four times over the years but also had an indefinite duration, which could be terminated only upon notice or upon certain events, such as a party's breach of the agreement. At one point, the parties even characterized an attempt to renegotiate the SPA as an effort to create a replacement "*master* strategic partnership agreement." (Italics added.) Instead of an agreement with a limited scope, the SPA was the overarching framework for the parties' business relationship.

In a related argument, Exigen contends that many of its transactions involving Genesys occurred "entirely independent from the SPA." As support for this contention, Exigen offers a non-disclosure agreement between the parties that makes no reference to the SPA, a software licensing agreement between Genesys and Exigen that requires disputes to be settled in state or federal court in California, and a proposal for training on Exigen products to be provided to Genesys (referred to as a "Statement of Work") that does not refer to the SPA. We are wholly unpersuaded by the argument that these agreements diminish the role played by the SPA.

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[7] During the hearing on the motion in the trial court, counsel for Genesys agreed with the court that the SPA does not preclude the parties from competing with each other. At oral argument in this appeal, counsel for Exigen characterized the statement by Genesys's attorney as a concession that the anticompetitive conduct alleged in the Second Amended Complaint does not arise from or otherwise relate to the SPA. We disagree. Even though the parties were free to compete, the SPA plainly imposed certain limitations on competition. For example, because the parties agreed to conduct business in a manner reflecting favorably upon each other's good will and reputation, the parties were entitled to expect that one party would not unfairly disparage the other party's products to gain a competitive advantage. Further, the SPA contemplated the parties would not compete by improperly using each other's trade secrets.

It is unsurprising that the parties would enter into various, discrete agreements to facilitate the business relationship governed by the SPA. Further, the examples offered by Exigen do little to support its point. The non-disclosure agreement proffered by Exigen is unsigned, undated, and does not specify what confidential information falls within its scope. The software licensing agreement referred to by Exigen is for a Genesys product and is limited to Exigen's use of the product solely for "evaluation and demonstration purposes only." The agreement is irrelevant to this dispute, but in any event the SPA envisioned that the parties would test and evaluate each other's products. It further provided sample licensing agreements to use in carrying out the terms of the SPA. Finally, the proposal for training to be provided to Genesys, also referred to as a statement of work, is entirely consistent with the SPA even though it does not specifically mention the SPA. The SPA anticipated the parties would provide training to each other and offered as an exhibit a sample "statement of work" the parties could use for that purpose.

We conclude the claims contained in Exigen's Second Amended Complaint fall within the scope of the SPA's broadly worded arbitration clause, at least as to the signatories to that agreement.

3. *Compelling Nonsignatories to Arbitrate*

Genesys contends the Exigen plaintiffs that did not sign the SPA should nonetheless be compelled to arbitrate their dispute with Genesys. Genesys relies on equitable principles of estoppel and alter ego to support its contention that nonsignatory plaintiffs may be bound by an arbitration provision found in a contract they did not sign. As noted above, the trial court did not reach this issue, choosing instead to deny the motion based on the threshold issue of whether the claims fell within the scope of the SPA. Because the issue is intensely factual in nature, the matter is properly remanded to the trial court to weigh the facts and assess the parties' competing claims. (See *EFund*, *supra,* 150 Cal.App.4th at p. 1330 [issue of nonsignatories' standing to arbitrate left for trial court to resolve].) Further, depending upon the court's resolution of this issue, the court may be vested with discretion to take a variety of courses of action, including dismissing or staying the trial court action, and ordering some, all, or none of the parties or claims into arbitration. (Code Civ. Proc., § 1281.2, subd. (c).) This discretion is appropriately exercised in the first instance by the trial court and not this reviewing court.[8]

DISPOSITION

The order denying the motion to compel arbitration is reversed. Upon issuance of the remittitur, the trial court is to consider whether equitable principles justify compelling Exigen plaintiffs that did not sign the SPA to arbitrate their dispute with Genesys. Genesys shall be entitled to recover its costs on appeal.

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McGuiness, P.J.

We concur:

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Pollak, J.

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Siggins, J.

[8] We emphasize that the scope of our remand does not permit the court to reconsider whether the claims alleged in the Second Amended Complaint fall within the scope of the SPA's arbitration clause, at least as to the signatories to the SPA.